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NOT FOR PUBLICATION

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 J & J Sports Productions Incorporated,

No. CV-16-01111-PHX-JJT

10 Plaintiff,

ORDER

11 v.

12 Jose O Rubio, *et al.*,

13 Defendants.
14

15 At issue are the following Motions: Defendant Jose O. Rubio's Motion to Dismiss
16 (Doc. 14, Mot.), to which Plaintiff J & J Sports Productions ("J & J") filed a Response
17 (Doc. 17, Resp.) and Mr. Rubio filed a Reply (Doc. 24, Reply); and Plaintiff's Motion to
18 Strike Defendant Grullo's Fine Mexican Food, LLC's ("Grullo's") Affirmative Defenses
19 (Doc. 19, Pl.'s Mot.), to which Grullo's filed a Response (Doc. 26) and J & J filed a
20 Reply (Doc. 28). For the reasons that follow, the Court will deny Mr. Rubio's Motion to
21 Dismiss and grant in part and deny in part J & J's Motion to Strike.

22 **I. DEFENDANT MR. RUBIO'S MOTION TO DISMISS**

23 **A. Background**

24 When analyzing a complaint for failure to state a claim for relief under Federal
25 Rule of Civil Procedure 12(b)(6), the Court accepts as true the plaintiff's non-conclusory,
26 material allegations in the complaint and construes them in the light most favorable to the
27 plaintiff. *See Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002)
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1 (citing *Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir.
2 1996)).

3 J & J alleges the following in its Complaint. J & J is a California corporation that
4 was granted exclusive nationwide commercial distribution rights to “The Fight of the
5 Century,” Floyd Mayweather v. Manny Pacquiao Championship Fight Program (the
6 “Program”), telecast nationwide on Saturday, May 2, 2015. Pursuant to its contract, J & J
7 entered into sublicensing agreements with various commercial entities in the United
8 States in which it granted these entities limited sublicensing rights to publicly show the
9 Program at their respective establishments. Defendant Mr. Rubio is the managing
10 member of Grullo’s Fine Mexican Food, LLC, which owns and operates the commercial
11 business Grullo’s a/k/a/ Tacos El Grullo a/k/a Grullos Fine Mexican Food (“Grullo’s
12 Restaurant”)¹ operating in Mesa, Arizona. J & J alleges that Defendant unlawfully
13 intercepted the Program for which J & J had distribution rights.

14 J & J alleges that Mr. Rubio is an individual specifically identified on the business
15 license for Grullo’s Restaurant and is an owner, and/or operator, and/or licensee, and/or
16 permittee, and/or person in charge, and/or individual with dominion, control, oversight
17 and management of those entities. Mr. Rubio’s name is listed on the Maricopa County
18 Environmental Service Department permit to operate for Grullo’s Restaurant. J & J states
19 that on the night of the Program, Mr. Rubio had the right, ability, and obligation to
20 supervise the activities of Grullo’s Restaurant, including the interception of the Program.
21 It further alleges that on information and belief, on the night of the Program, Mr. Rubio
22 specifically directed employees to intercept and broadcast the Program at Grullo’s
23 Restaurant or that the actions of the employees are directly imputable to Mr. Rubio due to
24 his responsibility for the actions of Grullo’s Restaurant. J & J states that Defendant, as a
25 managing member and individual listed on the Grullo’s Restaurant business license, had
26 a direct financial interest in its activities, including the interception of the Program. Based

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28 ¹ The Court notes that there are inconsistencies in the parties’ briefing regarding
the spelling of the various Grullo’s entities listed as Defendant, but the Court refers to
them collectively as Grullo’s Restaurant.

1 on the alleged unlawful broadcast of the Program, J & J alleges Grullo's Restaurant
2 obtained increased profits.

3 Based on the above allegations, J & J brought the following counts against
4 Defendant: 1) Violation of Title 47 U.S.C. § 605; and 2) Violation of Title 47 U.S.C.
5 § 553. Defendant now moves to dismiss J & J's claims against him.

6 **B. Legal Standard**

7 Rule 12(b)(6) is designed to "test[] the legal sufficiency of a claim." *Navarro v.*
8 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive dismissal for failure to state a claim
9 pursuant to Rule 12(b)(6), a complaint must contain more than "labels and conclusions"
10 or a "formulaic recitation of the elements of a cause of action"; it must contain factual
11 allegations sufficient to "raise a right to relief above the speculative level." *Bell Atl.*
12 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While "a complaint need not contain
13 detailed factual allegations . . . it must plead 'enough facts to state a claim to relief that is
14 plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.
15 2008) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the
16 plaintiff pleads factual content that allows the Court to draw the reasonable inference that
17 the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678
18 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard "asks for more than a
19 sheer possibility that a defendant has acted unlawfully." *Id.*

20 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), "[a]ll
21 allegations of material fact are taken as true and construed in the light most favorable to
22 the nonmoving party." *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1998). However,
23 legal conclusions couched as factual allegations are not given a presumption of
24 truthfulness, and "conclusory allegations of law and unwarranted inferences are not
25 sufficient to defeat a motion to dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.
26 1998).

1 **C. Analysis**

2 47 U.S.C. § 605 prohibits the unauthorized interception and publication or use of
3 radio communications, including satellite broadcasts. 47 U.S.C. § 605(a); *see J & J*
4 *Sports Productions, Inc. v. Manzano*, No. C-08-01872 RMW, 2008 WL 4542962, at *2
5 (N.D. Cal. Sept. 29, 2008). 47 U.S.C. § 553 prohibits unauthorized interception of cable
6 communications. 47 U.S.C. § 553(a)(1). The elements of a claim under § 605 are that the
7 defendant “(1) intercepted or aided the interception of, and (2) divulged or published, or
8 aided the divulging or publishing of, a communication transmitted by the plaintiff.” *Cal.*
9 *Satellite Sys. v. Seimon*, 767 F.2d 1364, 1366 (9th Cir. 1985). Section 553 prohibits a
10 person from “intercept[ing] or receiv[ing] or assist[ing] in intercepting or receiving any
11 communications service offered over a cable system.” 47 U.S.C. § 553(a)(1).

12 Here, J & J alleges that it transmitted the program, and that:

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14 With full knowledge that the Program was not to be intercepted, received,
15 published, divulged, and/or exhibited by commercial entities unauthorized
16 to do so, each and every one of the above named Defendants, either through
17 direct action or through actions of employees or agents directly imputable
18 to Defendants . . . , did unlawfully intercept, receive, publish, divulge,
display, and/or exhibit the Program at the time of its transmission at [the]
commercial establishment in Mesa Arizona

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20 (Doc. 1, Compl. ¶ 19.)

21 Mr. Rubio’s first argument is that, under Arizona state law, he cannot incur
22 personal liability because he is not a proper party to the proceedings by or against the
23 LLC solely by reason of being a member of the LLC. (Mot. at 3 (citing A.R.S. §§ 29-654,
24 29-656).) J & J, however, does not bring its claims against Mr. Rubio solely by reason of
25 being a member of the LLC. Rather, J & J alleges that Mr. Rubio is liable under the
26 standard that numerous district courts have employed in determining individual liability
27 for claims alleging violations of § 553 and § 605. *See, e.g., G & G Closed Circuit Events,*
28 *LLC v. Miranda*, No. 2:13-CV-2436-HRH, 2014 WL 956235, at *4 (D. Ariz. Mar. 12,
2014); *J & J Sports Prods., Inc. v. Walia*, No. 10-5136 SC, 2011 WL 902245, at *3 (N.D.

Cal. Mar. 14, 2011) (“Indeed, it appears that all courts addressing the issue have applied the copyright standard for individual liability to violations of § 553 and § 605.”) Under the applicable standard, “[t]o establish vicarious liability of an individual shareholder or officer for a violation of § 553 or § 605, a plaintiff must show that: (1) the individual had a right and ability to supervise the infringing activities and (2) had an obvious and direct financial interest in those activities.” *Miranda*, 2014 WL 956235, at *4 (quoting *Walia*, 2011 WL 902245, at *3). That an individual is a shareholder or officer “is insufficient to show that he or she had the requisite supervision authority or financial interest to warrant individual liability.” *Id.* “The plaintiff must allege that the defendant had supervisory power over the infringing conduct itself” and “cannot merely allege that the shareholders or officers profit in some way from the profits of the corporation.” *Id.*

Here, J & J has alleged that Mr. Rubio, as managing member of Grullo’s Fine Mexican Food, LLC and as an individual identified on the business license for Grullo’s Restaurant, had the right, ability, and obligation to supervise the activities of the business on May 2, 2015—the night of the Program. (Compl. ¶¶ 9–10.) J & J also alleges that Defendant “specifically directed the employees of [Grullo’s Restaurant] to unlawfully intercept and broadcast J & J’s Program” on the night of the Program or is responsible for their actions. (Compl. ¶ 11.) J & J further alleges Mr. Rubio supervised and/or authorized the unlawful broadcast of J & J’s Program resulting in increased profits. (Compl. ¶ 13.) And J & J alleges that Mr. Rubio, as managing member and as individual listed on the business license, “had an obvious and direct financial interest in the activities of [Grullo’s Restaurant,] which included the unlawful interception of Plaintiff’s Program.” (Compl. ¶ 12.)

J & J’s allegations are similar to those in *Miranda* and *J & J Sports Productions, Inc. v. Munguia*, No. CV-12-01961-PHX-SRB (D. Ariz. July 3, 2013),² in which the courts held plaintiffs’ allegations were sufficient to state plausible claims against the

² The Court notes that this opinion is unpublished, but was provided to the Court in the parties’ briefing.

defendants personally. In those cases, the plaintiff also alleged the defendant held a position of authority in the business, supervised the activities of the business, directed employees or was responsible for employees' actions resulting in interception of plaintiff's program, and authorized the unlawful interception for financial gain. *See Mirdanda*, 2014 WL 956235, at *5. Although J & J may learn of more details about Defendant's specific duties and supervisory decision as the case develops, at this stage, J & J has sufficiently alleged that Defendant had the right and ability to supervise the infringing activity, and that he had an obvious and direct financial interest in the activity. *See Miranda*, 2014 WL 956235, at *4. The Court will therefore deny Mr. Rubio's Motion to Dismiss.

II. MOTION TO STRIKE

J & J moves to strike Grullo's Fine Mexican Food, LLC's ("Grullo's") four affirmative defenses.

A. Legal Standard

Federal Rule of Civil Procedure 8(c) provides that a defendant must "state any avoidance or affirmative defense" in answering a complaint. The Ninth Circuit Court of Appeals has construed this requirement to mean that a defendant must give "fair notice" of affirmative defenses to the plaintiff. *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1023 (9th Cir. 2010) (citing *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979)). The Supreme Court has long held that fair notice requires only a plain statement of the nature and grounds of a claim or defense. *See Kohler v. Islands Rests., LP*, 280 F.R.D. 560, 564 (S.D. Cal. 2012) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

An affirmative defense may be insufficient as a matter of pleading or of law. *Id.*; *Fed. Deposit Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259, 262 (9th Cir. 1987). A party may ask the Court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" under Rule 12(f). "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v.*

1 *Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (quotation omitted), *rev'd on other*
 2 *grounds*, 510 U.S. 517 (1994). “‘Immaterial’ matter is that which has no essential or
 3 important relationship to the claim for relief or the defenses being pleaded.” *Id.* (quoting
 4 5 Charles A. Wright & Arthur R. Miller, *Fed. Practice & Procedure* § 1382, at 706–07,
 5 711 (2d ed. 1990)).

6 Courts generally view motions to strike disfavorably “because they are often used
 7 to delay and because of the limited importance of the pleadings in federal practice.”
 8 *Brewer v. Indymac Bank*, 609 F. Supp. 2d 1104, 1113 (E.D. Cal. 2009). “A motion to
 9 strike should not be granted unless it is absolutely clear that the matter to be stricken
 10 could have no possible bearing on the litigation.” *Id.*

11 **B. Analysis**

12 Grullo’s raises two affirmative defenses relating to damages under 47 U.S.C.
 13 §§ 553 and 605, and alleges that it is entitled to a reduction in damages. (Doc. 12,
 14 Answer ¶¶ 30, 31.) J & J argues these defenses should be stricken because they are
 15 denials, not affirmative defenses. (Pl.’s Mot. at 4.) J & J cites *Zivkovic v. S. Cal. Edison*
 16 *Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002), for the proposition that a defense that shows
 17 that a plaintiff has not met its burden of proof is not an affirmative defense. (Pl.’s Mot. at
 18 4.) The Court notes that Grullo’s affirmative defenses as to damages do, in part, allege
 19 that J & J has not met any willful and knowledge element of its claims. Whether Grullo’s
 20 willfully and knowingly violated the provisions, however is to be considered at a later
 21 stage when the Court determines what damages, if any, are proper under the relevant
 22 statutes.

23 J & J also argues that the affirmative defenses relating to damages should be
 24 stricken because they are redundant and fail to provide fair notice of the defense. (Pl.’s
 25 Mot. at 5.) The Court disagrees. All that is required to provide fair notice is a plain
 26 statement of the nature and grounds of a defense. *See Kohler*, 280 F.R.D. at 564. The first
 27 and second affirmative defenses provide “fair notice” to J & J that Grullo’s seeks to
 28 establish a lower level of *mens rea*, that it did not knowingly violate the law, under the

1 applicable statutes. *See Wyshak*, 607 F.2d at 927; *J & J Sports Prods., Inc. v. Gonzales*,
2 No. CV-15-00801-PHX-SPL, Doc. 29 at 2 (D. Ariz. Nov. 30, 2015).³ The Court also
3 does not find that the affirmative defenses are so redundant that the Court should strike
4 them. The Court thus denies J & J's Motion to Strike as to Grullo's first two affirmative
5 defenses relating to damages.

6 In Grullo's third affirmative defense, it alleges that the Program, if broadcast at the
7 business, was a tape-delayed match that was not intercepted, but legitimately broadcast
8 from Grullo's provider, SKY Television. (Answer ¶ 32.) J & J argues that this is not an
9 affirmative defense, but a denial of liability, and that the defense is legally insufficient.
10 (Pl.'s Mot. at 6.) J & J cites two federal district court decisions to support its argument
11 that it is irrelevant that the Program may have been "tape-delayed." (Pl.'s Mot. at 6–7.)
12 The Court is not bound by those decisions and further, finds them distinguishable based
13 on their posture at summary judgment. Here, the Court does not have the benefit of
14 reviewing facts that may be pertinent to Grullo's affirmative defense, and it will not
15 strike the defense at this stage. *See Brewer*, 609 F. Supp. 2d at 1113. The Court does note
16 that to the extent Grullo's uses the term "interception" in this defense, the Court agrees
17 with J & J that 47 U.S.C. §§ 605 and 553 do not only prohibit interception; the provisions
18 also prohibit other actions, including "receiving" or "divulging" information and
19 communications.

20 Finally, Grullo's states that SKY Television, its provider, is an indispensable party
21 that J & J failed to name as a defendant pursuant to Federal Rule of Civil Procedure 19.
22 (Answer ¶ 34.) Rule 19(a)(1)(A) provides that a person "must be joined as a party" if "in
23 that person's absence, the court cannot accord complete relief among existing parties."
24 Further, Rule 19(a)(1)(B) provides that a person "must be joined as a party" if "that
25 person claims an interest relating to the subject of the action and is so situated that
26 disposing of the action in the person's absence may: (i) as a practical matter impair or

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28 ³ The Court notes that this opinion is unpublished, but was provided to the Court
in the parties' briefing.

1 impede the person's ability to protect the interest; or (ii) leave an existing party subject to
2 a substantial risk of incurring double, multiple, or otherwise inconsistent obligations
3 because of the interest." If that required person cannot be joined, then "the court must
4 determine whether, in equity and good conscience, the action should proceed among the
5 existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

6 The Court agrees with other district courts and their reasoning in cases nearly
7 identical to the case at bar, in which they found the cable or satellite provider or
8 copyright holder is not an indispensable party in § 553 and § 605 actions. *See J & J*
9 *Sports Prods. Inc. v. Cela*, 139 F. Supp. 3d 495, 504–05 (D. Mass. 2015) (finding
10 salesperson and installer of direct-to-home satellite television broadcasting service were
11 not necessary parties); *Joe Hand Promotions, Inc. v. Bragg*, No. 13-CV-02725-BAS JLB,
12 2014 WL 2589242, at *9 (S.D. Cal. June 10, 2014) (finding DirecTV is not an
13 indispensable party and denying defendant's motion to dismiss); *J & J Sports Prods., Inc.*
14 *v. Coyne*, No. C 10-04206 CRB, 2011 WL 227670, at *2 (N.D. Cal. Jan. 24, 2011)
15 (striking affirmative defense of failure to join indispensable party with prejudice as
16 legally insufficient); *J & J Sports Prods., Inc. v. Live Oak Cnty. Post No. 6119 Veterans*
17 *of Foreign Wars*, No. CIV A C-08-270, 2009 WL 483157, at *4 (S.D. Tex. Feb. 24,
18 2009) (finding DirecTV is not an indispensable party and denying defendant's motion to
19 dismiss); *Nat'l Satellite Sports v. Gianikos*, No. 00 CV 566, 2001 WL 35675430, at *2–3
20 (S.D. Ohio June 21, 2001) (finding complete relief can be afforded to plaintiff in the
21 absence of the provider Time Warner). The Court can effectuate complete relief between
22 the existing parties, J &J and Defendants, and if Defendants are found liable, the issues
23 between the parties will be resolved. *See Cela*, 139 F. Supp. 3d at 505. Accordingly, SKY
24 Television is not a necessary party under Rule 19(a)(1)(A).

25 Defendant also does not show necessity of SKY Television under Rule
26 19(a)(1)(B). Even if SKY Television was claiming an interest in this case, its supposed
27 liability is not at issue here and therefore nothing impedes its ability to protect its
28 interests. Defendant also cannot show that SKY Television will be subject to a substantial

1 risk of incurring “inconsistent obligations” if the Court proceeds with this case. The
2 Court does not find that SKY Television is an indispensable party under Rule 19, and
3 thus finds Grullo’s fourth affirmative defense is legally invalid. The Court will grant J &
4 J’s Motion to Strike as to Defendant’s fourth affirmative defense. *See Kohler*, 280 F.R.D.
5 at 564.

6 **III. CONCLUSION**

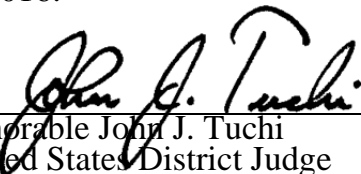
7 The Court finds that J & J’s allegations support its claims for violation of Title 47
8 U.S.C. § 605 and violation of Title U.S.C. § 553 against Mr. Rubio. Accordingly, the
9 Court denies Mr. Rubio’s Motion to Dismiss J & J’s claims against him. The Court also
10 denies J & J’s Motion to Strike Grullo’s Affirmative Defenses as to Grullo’s first three
11 defenses, but grants J & J’s Motion as to the fourth defense. Grullo’s fourth affirmative
12 defense is stricken from its Answer (Doc. 12).

13 IT IS THEREFORE ORDERED denying Defendant Jose O. Rubio’s Motion to
14 Dismiss (Doc. 14).

15 IT IS FURTHER ORDERED granting in part and denying in part Plaintiff’s
16 Motion to Strike Defendant’s Affirmative Defenses (Doc. 19). Defendant Grullo’s fourth
17 affirmative defense (Doc. 12 ¶ 34) shall be stricken.

18 IT IS FURTHER ORDERED that Defendant Jose O. Rubio shall file an Answer to
19 the Complaint within 14 Days of entry of this Order.

20 Dated this 1st day of August, 2016.

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23 Honorable John J. Tuchi
United States District Judge
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